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Practice and Procedure in Missouri

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PRACTICE AND PROCEDURE IN MISSOURI*

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I. DISCOVERY

The *1960 Rules of Civil Procedure* materially enlarged the scope of discovery permitted, but controversies concerning this subject continue to find their way into the appellate courts. Two significant cases appeared within the past year.

State ex rel. Rhodes v. Crain[1] was possibly the most important discovery case in recent years. Plaintiff sued a corporate defendant for the wrongful death of her husband. Defendant submitted an interrogatory to plaintiff asking: "Do you or your attorney know the names of any witnesses to this accident? If so, what are the names and addresses of the witnesses?"

Plaintiff answered that she knew of no witnesses and did not know whether her attorney had located any. This answer was not satisfactory to defendant so it asked the court to order plaintiff to give a complete answer which would include names of witnesses known to plaintiff's attorney. The trial judge denied the motion on the ground that

> the names of witnesses to an automobile accident which are discovered by an attorney during the attorney's investigation of the cause for the client and known solely to the attorney, are not subject to discovery by an interrogatory directed to the attorney's client because the identity and names of such witnesses are privileged matter and constitute "work product."[2]

A mandamus petition put the case before the Missouri Supreme Court and by a vote of five to two the court held that witnesses located by plaintiff's attorney during his investigation must be disclosed to defendant. The two dissenting judges were of the opinion that the names were "work product" and thus protected from discovery.

No lawyer enjoys the surprise of meeting a witness for the first time

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*This article contains a discussion of selected cases appearing in Volumes 359 through 375 of South Western Reporter, Second Series.

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1. 373 S.W.2d 38 (Mo. En Banc 1963).
2. *Id.* at 39.

on the stand, and the broadened discovery now permitted should eliminate this occupational hazard.

A second important decision is *State ex rel. Hudson v. Ginn*.[3] Plaintiff sued defendant for injuries allegedly suffered in an automobile accident. Defendant submitted several interrogatories to plaintiff but two are of special interest. Interrogatory 20 asked:

> If you have ever had any other claim or suit for injuries, damages, or disability other than the present petition, state all such previous claims or suits, the nature of your injuries or disabilities in the same, the dates of such previous suits or claims, the names and addresses of the persons, firms or corporations against which such claims or suits were made, the name and address of the court, commission or other body in which or before which such suits were filed and the amounts paid in settlement or judgment for such claims or suits.[4]

The supreme court held that the trial judge lacked discretion to deny the discovery sought by interrogatory 20.

> Rule 57.01(b) provides that a party
> may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party. . . . It is not ground for objection that the testimony will be inadmissible at trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Few things are more likely to lead to the discovery of admissible evidence than information concerning prior claims of the plaintiff. How else is the defendant to know if he is paying for injuries already recompensed?

Interrogatory 21 asked:

> If you have made claim under any health, accident, hospital, disability or other type of insurance for any sort of benefits, payments or allowances by reason of any injuries sustained by you in the accident (referred to in your petition) or any expenses incurred by you or paid by you, state the following:
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> a. Name and address of each such company.
> b. Policy number of each such company.

3. 374 S.W.2d 34 (Mo. En Banc 1964).
4. *Id.* at 36.

c. Nature of claim made.
d. Disposition of said claim.
e. Claim number assigned said claim.[5]

The trial judge refused to order plaintiff to answer this interrogatory and the supreme court held that this action was within the trial court's sound discretion. The logic of this conclusion is not completely clear. The court said that it would not overrule the trial judge because it was unable to say "*as a matter of law*" that the requested information was reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.) This result is difficult to understand because the court acknowledged: (1) that defendant hoped to discover some inconsistency in the claims made by plaintiff against his own insurer and those made against defendant, and (2) "the information sought in No. 21 *might become material*, relevant and free of any reasonable claim of privilege, if any he has, upon development of a situation such as this forecast by relator." (Emphasis added.)[6]

Defendant seems to be in an unenviable position. He does not know what plaintiff's answer would be and he is denied discovery because he cannot demonstrate that the unknown answers are, *as a matter of law*, reasonably calculated to lead to the discovery of admissible evidence.

Plaintiff did not claim that answering the inquiry would be an unreasonable burden, for sufficient safeguards already exist to prevent this type of abuse.[7] It is hard to understand why the trial judge should have discretion to deny discovery of materials which, in the court's own words, "might become material."

Missouri Rule 57.01(b) is substantially the same as Federal Rule 26(b) which has been in effect since 1939. The supreme court was undoubtedly aware of the construction given the federal rule and it would seem logical that they intended a similar construction for the Missouri rule. *State ex rel. Hudson v. Ginn* is, however, quite out of harmony with the federal decisions. These expressions by the federal courts indicate the very broad discovery permitted under Federal Rule 26(b):

> A party should not be foreclosed from examining on any subject which might conceivably have a bearing on the subject matter of the action;[8]

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5. *Ibid.*
6. *Id.* at 38.
7. Mo. R. Civ. P. 56.01(a), 57.01(c).
8. Bloomer v. Sirian Lamp Co., 4 F.R.D. 167, 169 (D. Del. 1944).

> [U]nless the information sought can have no possible bearing on the issues disclosed by the pleadings, the interrogatories should be answered;[9]
>
> "Fishing expeditions" for evidentiary facts are permitted under the Federal Rules of Civil Procedure. So long as interrogatories relate to the subject matter of an action, and may lead to relevant facts, they are proper.[10]

A leading text writer referring to Federal Rule 26(b) states:

> Indeed it is not too strong to say that discovery should be considered relevant where there is any possibility that the information sought may be relevant to the subject matter of the action. If protection is needed, it can be better provided by the discretionary powers of the Court under Rule 30, rather than a constricting concept of relevance.[11]

The need for permitting this broad discovery is demonstrated by defendant's dilemma in the instant case. If plaintiff did in fact make claims against his own insurer totally inconsistent with those made against defendant, defendant will never be allowed to know it and the damaging effect of such inconsistency will never reach the jury. This result seems out of harmony with Missouri's discovery rules.

II. Opening Statements

The recent case of *Butcher v. Main*[12] is a sharp reminder to trial lawyers that opening statements can lose law suits. Plaintiff sued three defendants but two of those defendants were granted directed verdicts at the close of plaintiff's opening statement. The two defendants receiving directed verdicts had collided on the highway ahead of plaintiff. Plaintiff was able to stop short of the wreck and while so stopped was struck from the rear by a third defendant, Hiram Main. Plaintiff's counsel in his opening statement said that plaintiff "had ample time to apply her brakes and come to a slow and gradual stop" behind the collision, and the plaintiff "remained in that position for a period of about five to ten seconds" before being hit from the rear by defendant Main. This demonstrated rather clearly that the negligence of the two dismissed defendants was not a proximate cause of plaintiff's injuries.

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9. Foundry Equipment Co. v. Carl-Mayer Corp., 14 Fed. Rules Serv. 33.31, Case 3 (N.D. Ohio Oct. 10, 1950).
10. Glick v. McKesson & Robbins, 10 F.R.D. 477, 479 (W.D. Mo. 1950).
11. 2A Barron & Holtzoff, Federal Practice and Procedure § 647 at 67 (Wright ed. 1961).
12. 371 S.W.2d 203 (Mo. 1963).

Since plaintiff pleaded similar allegations, a demurrer might properly have been sustained. In any event, "The quoted allegation in plaintiff's petition and the similar recital of her counsel in the opening statement, disclose[d] a situation which would clearly bar her recovery."[13]

The supreme court cautions that trial courts "should be very reluctant to direct a verdict at the close of plaintiff's opening statement."[14] The mere failure of a plaintiff to state facts in his opening statement sufficient to make a submissible case is not grounds for a directed verdict unless counsel affirmatively admits that he has no evidence on the missing elements.[15] More commonly the difficulty comes from an opening statement which admits a fact, the existence of which bars recovery.[16]

One further hazard must be watched. Remarks made in an opening statement may be judicial admissions and as such they relieve one's opponent from the burden of proving the matter admitted. The thin line between a judicial admission and a mere statement of anticipated proof is not always clear.[17] A fairly recent case demonstrates this problem. In *Bayer v. American Mut. Cas. Co.*[18] plaintiffs sued defendant for fraud contending that they had been induced to invest money in the defendant company at a time when the company was insolvent. There was no direct evidence that the company was insolvent when plaintiffs made their investment and plaintiffs sought to fill this gap with an alleged judicial admission made by defense counsel in his opening statement. Defense counsel had said the evidence would show that when plaintiffs were negotiating with defendant, plaintiffs agreed to put their money into defendant company to "build up its assets, so to say, to make the company solvent, to give it operating capital."

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13. *Id.* at 207.
14. *Id.* at 206.
15. Butcher v. Main, 371 S.W.2d 203, 207 (Mo. 1963). In Republic Steel Corp. v. Atlas Housewrecking & Lumber Corp., 113 S.W.2d 155 (K.C. Mo. App. 1938), the court directed a verdict for plaintiff because defendant admitted that he had only one defense and the court found that defense legally insufficient.
16. In Pratt v. Conway, 148 Mo. 291, 299, 49 S.W. 1028, 1030 (1899) the court said:

> Courts are warranted in acting upon the admissions of counsel in the trial of a cause. They are officers of the court, and represent their clients, and their admissions thus made bind their principals.
>
> It has been ruled again and again that where counsel in their opening statements state or admit facts the existence of which precludes a recovery by their clients, the courts may close the case at once and give judgment against the clients.

17. Russ v. Wabash Western Ry., 112 Mo. 45, 20 S.W. 472 (1892); Wonderly v. Little Hoys Inv. Co., 184 S.W. 1188 (St. L. Mo. App. 1916); Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S.W. 314, 316 (St. L. Ct. App. 1903).
18. 359 S.W.2d 748 (Mo. 1962).

The supreme court held that these words did not constitute a binding admission that the defendant company was insolvent at the time of the negotiations but rather were mere statements of anticipated proof. Defense counsel had prefaced his remarks by saying, "I can tell you what I think the evidence in this case will disclose," and this seems to have diluted the effect of what followed.

While directed verdicts at the close of opening statements are rather rare, it is worthwhile to remember that admissions made during an opening statement can change the outcome of a case.

III. Post-Trial Motions

Allegations of error are not preserved for appellate review unless presented to the trial judge in a motion for a new trial. A good deal of error has thus been waived because it was not mentioned in the new trial motion or because it was not described in sufficient detail.

Rule 79.03 provides in part: "Allegations of error in order to be preserved for appellate review, must be presented to the trial court in a motion for a new trial." Where definite objections or requests were made during the trial in accordance with Rule 79.01, including specific objections to instructions, a general statement in the motion of any allegations of error based thereon is sufficient.

As specific objections to evidence must be made during trial, a general objection as to the admission of evidence would seem to be a literal compliance with the rule.

In *State ex rel. Kansas City Power & Light Co. v. Salmark Home Builders, Inc.*[19] appellant made such a general objection in his new trial motion when he complained only that the trial court "erred in admitting incompetent, irrelevant and immaterial evidence on behalf of plaintiff." The supreme court somewhat reluctantly agreed that this was sufficient to preserve a specific point of evidence for review. Had not the court felt bound to follow earlier cases the result would probably have been different.

The court severely criticized the use of such general objections for they do nothing to aid the trial judge in correcting his own mistakes and thus frustrate the purpose of the new trial motion. The court said:

> Surely a general catch-all objection that the trial court erred in admitting incompetent, irrelevant and immaterial testimony should not be sufficient to preserve all matters for appellant review where-

19. 375 S.W.2d 92 (Mo. 1964).

> in the trial court (perhaps in ten to a hundred different instances) admitted evidence over the objection of a party. In view of the prior ruling to the contrary . . . we, nevertheless, shall rule the question presented on its merits.[20]

Cautious lawyers may find this sufficient encouragement for including detailed specifications of error in future new trial motions.[21] In any event, the case demonstrates that Rule 79.01 could stand some revising. Appellate briefs must specify in detail the particular evidence ruling complained of. If the trial judge is to correct his own errors and eliminate unnecessary appeals, he should have the same information.

IV. Wrongful Death Actions

Accidents which cause personal injuries followed by death from a disputed cause pose special problems for Missouri lawyers. If the injuries produced the death, damages for the wrongful death may be recovered by the widow, minor children or others specified in the statute.[22] If death came from another cause, such as a pre-existing cancer, the decedent's claim for personal injuries survives and may be asserted by his executor or administrator "and the measure of damages [is] the same as if such death . . . had not occurred."[23] In short, if the defendant caused the death he is liable under the wrongful death statute; if he caused only injuries *not* resulting in death, he is liable to decedent's personal representative for those injuries.

When there is a dispute as to the cause of death, the specter of double liability looms. For example, the widow may claim defendant caused her husband's death and sue under the wrongful death statute. Decedent's administrator may claim that defendant did not cause the death and sue

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20. 375 S.W.2d 92, 96 (Mo. 1964).

21. In Bader v. Hylarides, 374 S.W.2d 616 (K.C. Mo. App. 1964), appellant complained that the trial judge had erred in allowing an improper closing argument and in admitting hearsay evidence. Appellant's new trial motion said simply: "The court erred in admitting irrelevant, incompetent, illegal, hearsay, immaterial, prejudicial and highly inflammatory evidence and testimony." The Court of Appeals said of this motion: "We doubt that this specification meets the requirement of Rule 83.13(a) *supra,* that 'no allegations of error shall be considered . . . except such as have been presented to or expressly decided by the trial court.' Both of these assignments are overruled."

22. § 537.080, RSMo 1959. This section provides in part: "Whenever the *death* of a person *shall be caused* by a wrongful act, neglect or default of another. . . ." (Emphasis added.)

23. § 537.020, RSMo 1959. This section provides in part: "Causes of action for personal injuries, *other than those resulting in death,* . . . shall not abate by reason of his death . . . but . . . shall survive to the personal representative of such injured party." (Emphasis added.)

to recover for decedent's personal injuries. It is obviously unfair to require defendant to pay in one action because he caused the death and then pay in a separate action on the basis that he did not cause the death. Unfair or not, the result has occurred.

In *Harris v. Goggins*[24] decedent had cancer. While decedent was being moved from the hospital to her home, the ambulance in which she was riding collided with a truck. Decedent sustained injuries and died three months later. Decedent's husband brought suit under the wrongful death statute alleging that the collision caused the death. He later dismissed his action with prejudice and released the defendants on payment of $5,125.00. Thereafter decedent's son, as administrator, brought an action to recover for decedent's injuries on the theory that the collision had *not* caused the death. Defendants protested that the husband's action was a bar to the administrator's suit "by reason of appropriation, estoppel, merger and res judicata," and that the legislature did not intend to give more than one recovery. The supreme court rejected defendants' arguments and allowed the administrator to recover saying:

> We agree that the legislature intended only one recovery. The difficulty, however, is that it did not prescribe any procedure whereby it could determine which should be the one to recover. . . . If [defendant] wishes to make a settlement he should obtain a release from both. If he cannot obtain the releases or if he does not want to settle the case, he can resort to the procedure followed in Plaza Express.[25]

The procedure used and approved in *Plaza Express*[26] was an interpleader action. The court ordered the widow and administrator to interplead and have adjudicated whether the injury caused decedent's death and restrained both from continuing their separate actions pending this determination. After this issue was decided by the court as an equity matter, the party owning the claim could then "proceed therewith as an action at law in the court in which the claim is pending and the other claimant must be enjoined from proceeding further with his or her claim."[27]

The interpleader action not only cuts off one claimant but also makes a determination on the cause of death which is binding in the subsequent

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24. 374 S.W.2d 6 (Mo. 1964).
25. *Id.* at 14.
26. Plaza Express Company, Inc. v. Galloway, 365 Mo. 166, 280 S.W.2d 17 (En Banc 1955).
27. *Id.* at 177, 280 S.W.2d at 25.

suit. This apparently was an unexpected result for defendant in *Donohue v. St. Louis Pub. Serv. Co.*[28] The decedent in this case also suffered from cancer and the cause of his death was in dispute. The Public Service Company was faced with a suit for personal injuries by the widow in her capacity as executrix and a separate suit by the widow for wrongful death. Public Service Company filed an interpleader action joining the widow personally and in her capacity as executrix and asked the court to determine which of the two actions the widow would be permitted to prosecute. The court in equity ruled with the consent of all the parties, that the widow was barred from prosecuting her action as executrix. Later when the wrongful death case came to trial, Public Service Company denied a causal connection between the injuries suffered by decedent and his subsequent death. The court gave an instruction directing a verdict for defendant if decedent's death was caused by cancer.

The supreme court held that this was reversible error saying:

> A decree by court of equity barring the personal injury case from further prosecution must of necessity be based upon a finding that the injury caused the death of the injured party. If that be true, then the issue of fact has been determined and the decree is binding on both the plaintiff and the defendant . . . . Therefore, in the trial of the case for wrongful death the issue of whether the injury caused death should not be submitted to a jury.[29]

The court also said: "The fact that the decree in the equity action was entered by the consent of the parties makes it no less binding on all of the parties in this case."[30]

28. 374 S.W.2d 79 (Mo. 1963).
29. *Id.* at 81.
30. The binding effect of judgments entered by consent of the parties will be discussed in detail in a later issue of the *Missouri Law Review.*